

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

WPS Energy Services, Inc.	:	
	:	
Petition for certification as an	:	
Alternative retail electric supplier.	:	00-0199

**INITIAL BRIEF OF  
BLACKHAWK ENERGY SERVICES, L.L.C.**

Blackhawk Energy Services, L.L.C. (“Blackhawk”), by Piper Marbury Rudnick & Wolfe, its attorneys, hereby submits its initial brief regarding the decision of the Illinois Commerce Commission (“Commission”) to reopen the above-referenced proceeding to determine if it erred in granting WPS Energy Services, Inc. (“WPS”) a certificate of service authority to operate as an alternative retail electric supplier (“ARES”) in Illinois.

**I.**

**EXECUTIVE SUMMARY:**

**THE COMMISSION SHOULD  
ENTER AN ORDER CONCLUDING THAT IT CORRECTLY  
APPROVED THE ARES APPLICATION OF WPS ENERGY SERVICES, INC.**

The original ARES application filed by WPS complied with the requirements of the Public Utilities Act (“Act”) and, based upon its demonstration on reopening, WPS continues to comply with the Act. Accordingly, the Commission should enter an order concluding that it did not err in construing the reciprocity provision in Section 16-115(d)(5) of the Act in granting WPS a certificate to operate as an ARES.

On March 2, 2000, WPS submitted a verified application that demonstrated, among other things, that it is uneconomical for either Commonwealth Edison Company (“Edison”), Illinois

Power Company (“Illinois Power” or “IP”), Central Illinois Public Service Company (“CIPS”), and Central Illinois Light Company (“CILCO”) to serve retail customers in the service territory of the utility affiliates of WPS in Wisconsin and Michigan. Accordingly, on April 18, 2000, the Commission granted WPS a certificate of service authority to operate as an alternative retail electric supplier (“ARES”) in Illinois. (*See WPS Energy Services, Inc., Petition for Certification as an Alternative Retail Electric Supplier, Order* at 10, hereinafter “WPS Order”).

On March 16, 2001, the Commission entered an Order Reopening the instant proceeding, indicating that it was concerned that it may have erred in construing the reciprocity requirement contained in Section 16-115(d)(5) of the Act. (*See Order on Reopening* at 1.) The Commission indicated that it intends to consider whether to rescind, alter, or amend the Order that it entered finding that WPS meets the reciprocity requirements in the Act. (*See id.* at 5.) No other basis was stated for reopening the instant proceeding. Without any explanation as to why it is deviating from its past practice, the Commission also reinterpreted the Act and indicated that it would allow evidence and argument from other parties in reaching its findings in ARES certification proceedings. (*See id.* at 3-4.) Such an abrupt and unexplained change in policy guarantees that an appellate court will closely scrutinize the Commission’s decision. (*See BPPI v. Illinois Commerce Comm’n*, 136 Ill. 2d 192, 228, 555 N.E.2d 693, 709 (1989).)

For any number of reasons, the procedure employed by the Commission was improper. First and foremost, the Commission does not have any statutory authority allowing it to enter the Order Reopening. That is, the Commission does not have the authority to re-examine the certification of WPS in the procedural manner in which this proceeding on reopening was initiated. Second, the process utilized in the instant proceeding amounts to an improper rulemaking. Third, as a result of the lack of due process in the way in which the instant

proceeding was conducted, if the Commission were to revoke, suspend, or amend WPS's certificate it would amount to a violation of WPS's property interest in its certificate.

As the Commission is aware, the reciprocity issue was recently addressed in Blackhawk's ARES certification proceeding by the Commission. On April 6, 2001, the Commission entered an Order granting Blackhawk a certificate of service authority to serve eligible non-residential retail customers in the Edison and Illinois Power service territories. (*See Blackhawk Energy Services, L.L.C., Application for Certificate of Service Authority Under Section 16-115 of the Public Utilities Act, Order* at 24.) The Commission rejected the analysis in the Staff Report and found that the analysis presented by Blackhawk, which was based upon the approach that the Commission originally accepted for WPS, demonstrated that electric power and energy could not be economically delivered by Edison and IP to retail customers of Blackhawk's utility-affiliates. (*See id.* at 21 - 23.)

Similarly, the Commission should enter an Order in the instant proceeding concluding that it did not err in interpreting the reciprocity provisions in the Act and that WPS continues to comply with the requirements of a certified ARES.

## **II.**

### **THE COMMISSION SHOULD ENTER AN ORDER THAT IS CONSISTENT WITH ITS PRIOR ORDERS APPROVING ARES CERTIFICATION REQUESTS**

In originally deciding that WPS Energy was entitled to a certificate to operate as an ARES, the Commission considered what analysis was appropriate for the purpose of assessing the economic delivery standard in the reciprocity provision of the Act. Using the analysis presented by WPS, the Commission concluded that it was not economical for Illinois electric utilities to deliver electric power and energy to the service areas of WPS's utility affiliates. (*See*

WPS Order at 9.) In the *Blackhawk* proceeding, the Commission again endorsed the same economic delivery standard and found the applicant was in compliance with the reciprocity provisions of the Act.

The Commission Staff not only continues to stand behind its original analysis and conclusion that WPS is in compliance with the reciprocity provisions, but stands behind its analysis of the reciprocity provisions as it has been applied to other ARES applicants. (*See* Tr. at 70-71.) In fact, Staff witness Larson admitted that WPS's original economic delivery analysis demonstrated compliance with the reciprocity provisions and that he was in no way inhibited in reaching this conclusion. (*See id.* at 72.) Significantly, Staff witness Larson stated that **but for** the Commission directing the Staff to revisit the issue, he would not have revisited his original position. (*See id.*)

Nevertheless, without providing a reasoned analysis supporting its new position, the Commission Staff Report in the instant proceeding on reopening suggests that the Commission abandon its previously-established policy. (*See* Staff Report at 4.) The Staff Report in the instant proceeding on reopening suffers from the same infirmities as did the Staff Report that the Commission rejected in *Blackhawk*. Indeed, on cross-examination, Staff witness Bruce Larson admitted that many of the assumptions underlying the Staff Report are incorrect.

Based upon its original application and supporting attachments, as well as the evidentiary record on reopening, WPS has presented an analysis that demonstrates it is in compliance with the reciprocity requirement in the Act. Contrary to the analysis presented in the Staff Report, WPS's analysis accurately reflects the way in which the marketplace for electric power and energy operates.

**A. SUMMARY OF THE ORDER IN  
THE *BLACKHAWK* ARES PROCEEDING**

On April 6, 2001, in Docket No. 01-0174, the Commission concluded that Blackhawk was entitled to an ARES certificate because Blackhawk demonstrated its compliance with the reciprocity provisions in the Act. (*See id.* at 23.) In its Order, the Commission accepted Blackhawk’s methodology to establish compliance, which was similar to the methodology utilized by WPS in its original application. The Commission also rejected the analysis in the Staff Report as failing to reflect the realities of the wholesale and retail electric markets. (*See id.* at 22.) Each error the Commission identified in the Staff Report provided a basis to reject the Staff Report in favor of the analysis presented by Blackhawk.

As explained in the Order in *Blackhawk*, the Commission disagreed with the basic premise of the Staff Report. As the Commission explained, the basic premise in the Staff Report was that “wholesale power costs do not vary with load factors . . .” (*Id.* at 22.) The Commission found that firm retail customers need to be served by purchasing firm power in the wholesale market, which includes energy and capacity. (*See id.*) The Commission agreed with Blackhawk that, depending upon on how the power is purchased and priced, there may be a separate reservation or demand charge for capacity or it may be included in the price for power. (*See id.*) The Commission found that firm wholesale electric power contracts typically address the issue of capacity or “load factors” in one of several ways:

- A separate demand charge;
- A requirement that electric power is taken at a specified load factor (wholesale electric power is commonly sold in 100% load factor blocks for the on-peak hours of the period under contract, such as electric power purchased on the basis of the Cinergy Index); or

- Requiring that the purchaser take electric power within a specific range of load factors.

(*Id.* at 23.) The Commission explained that even if any one of those approaches was not used, the price of the energy component could be adjusted to reflect the varying costs associated with serving customers with different load factors.

The Commission also found that the Staff Report improperly based its analysis on a hypothetical subgroup of customers, rather than using an average customer class. (*See id.*) Staff's analysis improperly failed to reflect the fact that the actual costs for serving customers will vary, based upon factors such as weather, units in service and current fuel costs. (*See id.*) The Commission criticized the Staff Report for using an "apples to oranges" comparison that mixed average costs with actual costs. (*See id.* at 23.) The Commission concluded that the Staff Report improperly relied upon average wholesale prices to calculate the cost to serve customers with specific load factors.

In short, the Commission soundly criticized the analysis in the Staff Report and again endorsed the methodology that was approved by the Commission in the original WPS proceeding.

**B. THE RECORD IN THE INSTANT  
PROCEEDING DEMONSTRATES THAT THE  
STAFF REPORT CONTAINS NUMEROUS ERRONEOUS ASSUMPTIONS**

The analysis contained in the Staff Report in the instant proceeding is based upon the same analytic framework that was presented in the Staff Report in *Blackhawk* and rejected by the Commission. The basic premise for the analysis contained in the Staff Report again is that wholesale power costs do not vary with load factor. (*See* WPS Ex. 1.0 at 1.) As in *Blackhawk*, the Staff Report does not even attempt to reflect the cost for purchasing capacity in the wholesale

market in the wholesale cost of electric power and energy. Indeed, the record in the instant proceeding on reopening is more complete in revealing the errors in the Staff Report because, upon cross-examination, Staff's witness was forced to recognize the realities of the electricity markets did not match the assumptions in the Staff Report. (*See, e.g.*, Tr. at 42-43.) Since the Staff Report in the instant proceeding is flawed, the Commission should again conclude that the Staff Report is not persuasive.

The Staff Report in the instant proceeding on reopening contains the basic premise that the cost to purchase power in the wholesale market for two customers of the same demand size but different load factors would be identical. This is the same premise that the Commission soundly rejected in *Blackhawk*. Furthermore, WPS demonstrated that the cost to purchase power to supply a customer with a load factor of 30% is 47% actually higher than the cost to purchase power for the same size customer with a load factor of 80%. (*See* WPS Ex. 1.0 at 3.) Again, just as in *Blackhawk*, at least one of the reasons for the inaccurate conclusion contained in the Staff Report is the mistaken and improper reliance upon average prices to calculate costs for customers with specific load factors.

Further, WPS supplied additional and updated record evidence in support of its economic delivery analysis based upon the new market value energy charges submitted by Edison on April 2, 2001. (*See* WPS Ex. 3.0.) As Staff witness Larson explained, based upon the updated WPS filing, the "break-even" point under Staff's analysis for a 1MW customer dropped to just under a 25% load factor customer. (*See* Tr. at 70. *See also* WPS Ex. 3.0, Exhibit A.) There was no evidence that any such customer even exists in the service area of WPS's utility affiliate.

Moreover, the Staff Report failed to take into account admittedly relevant considerations. For example, Staff witness Larson admitted that in the course of preparation of its Staff Report,

**no** investigation was undertaken to determine whether customers with a load factor of just above 30% primarily used on-peak versus off-peak power. (*See* Tr. at 49.) However, he admitted that this is a relevant consideration because a customer that uses power would pay more if it used that power on-peak versus off-peak. (*See* Tr. at 43.) Staff witness Larson admitted that the cost of wholesale electric power varies hourly, depending upon many factors including weather, units in service, transmission constraints, outages of transmission equipment, and current fuel costs. (*See* Tr. at 42. *See also* Blackhawk Order at 22.) However, the Staff Report does not consider any of these factors.

Finally, the Staff Report is flawed for a very significant and important policy reason. Staff witness Larson admitted that he did not consider the impact of Staff's new economic delivery standard upon the development of the competitive market in Illinois. (*See* Tr. at 66.) However, Mr. Larson agreed that if the Staff position were to be adopted in the instant proceeding that it would eliminate one ARES from competing in the Illinois market and that if it became the general standard, a number of other companies would be excluded from the Illinois market. (*See id.*) The Commission has an affirmative duty to promote the development of competition in the retail electric market. (*See* 220 ILCS 5/16-101A(d).) Relying upon the flawed analysis of the Staff Report would run directly counter to that statutory duty.

Blackhawk respectfully requests that the Commission conclude that WPS continues to comply with the reciprocity requirements of the Act because electric power and energy cannot be economically delivered from the service territories of Edison, CIPS, CILCO, and Illinois Power to serve retail load in the service areas of WPS's utility affiliates.



### **III.**

#### **THE PROCEDURE EMPLOYED BY THE COMMISSION IN REOPENING THE INSTANT PROCEEDING VIOLATED THE ACT, THE COMMISSION'S RULES AND REGULATIONS AND ALL NOTIONS OF DUE PROCESS**

Not only does the entry of the Order on Reopening violate the Act but the procedure that was employed by the Hearing Examiner is contrary to the Act, the Commission's rules and regulations and the requirements of due process. At the most basic level, there was no explanation regarding why the Commission should rush to judgment in this proceeding rather than initiating a rulemaking in due course. The "hearing" that was conducted likewise was improper. For example, at the hearing, the Hearing Examiner refused to clarify a ruling on whether the interventions, pleadings and comments of certain parties were to be considered evidence in the record. (*See* Tr. at 31-36, 118-124.) As a result of the process employed in the instant proceeding, if the Commission were to enter an Order that rescinds, alters, or amends WPS's certificate, such an Order would not withstand appellate scrutiny.

#### **A. THE ORDER REOPENING THE PROCEEDING VIOLATES THE ACT**

The Commission's authority is well settled under Illinois law. An administrative agency is created by statute and has no general or common law powers. The authority of an agency must either arise from the expressed language of the enabling statute, or devolve by fair implication and intentment from the express provisions of the statute as an incident to achieving the objectives for which the agency was created. The Commission has no authority except that expressly conferred upon it and is without a power to extend its jurisdiction, as that is a legislative prerogative. (*See Peoples Gas Light and Coke Co. v. Illinois Commerce Comm'n*, 165 Ill. App. 3d. 235, 520 N.E.2d 46, 54 (Ill. App. 1987).) The Commission's only powers are

that conferred upon it by the General Assembly and it has no arbitrary powers. (*See Illinois Commerce Comm’n v. New York Central Ry. Co.*, 398 Ill. 11, 75 N.E.2d 411, 414 (1947).)

**1. The Commission’s Reliance Upon  
Section 10-113 of the Act Is Misplaced**

The Commission improperly asserted that it has relied upon Section 10-113 of the Act in attempting to justify its decision for reopening the instant proceeding. (*See Order Reopening at 4.*) However, contrary to Staff’s assertions, the provisions of Section 10-113 of the Act do **not** apply to WPS. (*See Staff Response to WPS Motion To Set Aside at 2. But see 220 ILCS 5/10-113.*) Section 10-113 of the Act provides, in part, as follows:

“Anything in this Act to the contrary notwithstanding, the Commission may at any time, upon notice to the **public utility** affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any rule, regulation, order or decision made by it. Any order rescinding, altering, or amending a prior rule, regulation, order or decision shall, when served upon the **public utility** affected, have the same effect as is herein provided for original rules, regulations, orders or decisions.”

(220 ILCS 5/10-113) (Emphasis added.)

There is one significant problem with the Commission’s reliance upon Section 10-113 of the Act: WPS Energy is not a public utility; it is an ARES. ARES are specifically excluded from the definition of a public utility. (*See 220 ILCS 5/3-105(c)(9).*) Based upon the express language of Section 10-113 of the Act, the Commission’s authority to rescind, alter or amend a prior rule, regulation, order or decision is limited to a “public utility.” The Act sets forth procedures relating to ARES certification in Sections 16-115, -115A, and -115B. (*See 220 ILCS 16-115, -115A, -115B.*)

The Commission cannot deviate from the plain and unambiguous reading of the statute. WPS is not a public utility but rather an ARES. Therefore, Section 10-113 of the Act does not apply to WPS and the Commission’s reliance upon Section 10-113 is misplaced.

**2. The Commission's Reliance  
Upon Section 200.900 Of It's Rules Is Equally Misplaced**

In its Order Reopening, the Commission also cites Section 200.900 of its Rules for authority to reopen the instant proceeding. (*See* Order Reopening at 4.). However, an administrative agency such as the Commission cannot effectively alter or change statutes by the exercise of its power to make rules and regulations. (*See Harton v. City of Chicago Department of Public Works*, 234 Ill. Dec. 632, 703 N.E. 2d 493, 501-02 (Ill. App. 1998).) That is, there must be statutory authority for the Commission to act. Section 200.900 of the Commission's Rules of Practice can only apply to the instant proceeding if the Commission can point to some enabling authority that would permit it to reconsider WPS's certification under the circumstances stated in the Order Reopening. Since the Commission relies upon Section 10-113 for this authority, its resulting reliance upon Section 200.900 of its Rules is equally flawed.

**3. The Order On Reopening Is Not Contemplated  
Under The Act Or The Commission's ARES Certification Rules**

The Commission's authority over ARES is expressly provided in Sections 16-115, 16-115A, and 16-115B of the Act. (*See* 220 ILCS 5/16-115, 115A, -115B.) The General Assembly delegated to the Commission the authority to certify ARES pursuant to Section 16-115 of the Act. (*See* 220 ILCS 5/16-115.) Section 16-115A of the Act outlines the obligations of an ARES. (*See* 220 ILCS 5/16-115A.) Section 16-115B of the Act provides for the Commission's oversight of services provided by ARES. (*See* 220 ILCS 5/16-115B.)

The General Assembly delegated to the Commission "the authority to promulgate rules and regulations to carry out the provisions of this Section." (220 ILCS 5/16-115(f).) In three separate proceedings, the Commission has adopted rather extensive rules pertaining to the certification of ARES. (*See Illinois Commerce Commission, Implementation of Section 16-*

*115(f) of the Act*, ICC Docket. No. 98-0544 (Dec. 16, 1998); *Illinois Commerce Commission, Certification of ARES Not Seeking Expedited Treatment*, ICC Docket. No. 98-0649 (June 30, 1999); and *Illinois Commerce Commission, Amendment of Part 451*, ICC Docket. No. 99-0614 (Aug. 15, 2000).) However, nowhere in the certification rules are there any provisions that address the physical or economical constraints in the reciprocity statute. Nor are there any provisions that govern whether other entities may participate in the certification process, much less the manner and means in which they may participate.

Additionally, Section 16-115B of the Act specifically provides the Commission with the authority, after notice and hearing held on complaint or on the Commission's own motion, to take action against an ARES for any violation of or non-conformance with the provisions of Sections 16-115 or 16-115A of the Act. (*See id.*) Pursuant to Sections 16-115 and 16-115A of the Act, the Commission is expressly empowered to revoke or suspend the certificate of service authority of an ARES for substantial or repeated violations of or non-conformance with the provisions of Sections 16-115 or 16-115A of the Act. (*See 220 ILCS 5/16-115, -115A.*)

The Commission's Order Reopening the Proceeding does not allege that WPS has violated or is in non-conformance with the provisions of Sections 16-115 or 16-115A, nor has it suggested or implied that WPS has made substantial or repeated violations of or non-conformances with the provisions of these sections of the Act. In accordance with the Act and the Commission's ARES certification rules, the Commission should set aside its Order Reopening.

#### **4. The Order On Reopening Amounts To An Illegal Rulemaking**

By its express language, the Commission's Order Reopening appears to be an improper attempt to engage in rulemaking. The Commission's Order on Reopening expressly envisions a

change to the Commission's ARES certification rules by permitting input from other parties as well as the proper interpretation of Section 16-115(d)(5) of the Act. (*See Order Reopening* at 1-2, 3 - 4.) As properly recognized by Commissioner Kretschmer in her dissenting opinion in the *Blackhawk*, the Commission has a legitimate interest in defining standards for evaluating the reciprocity issue. (*See Dissenting Opinion of Commissioner Ruth K. Kretschmer, From The Order Entered By The Commission On April 6, 2001* at 3.) However, to the extent the Commission wishes to change a policy regarding ARES certification, it must do so as a rulemaking.

Likewise, to the extent the Commission intends to effectuate a change in its ARES certification rules, the Commission must abide by the procedural requirements in the Illinois Administrative Procedure Act. (*See 5 ILCS 100/5.*) The Commission's decision to allow input from other parties in the instant proceeding on reopening is a departure from its ARES certification rules that have general applicability to all ARES applicants. (*See Order on Reopening* at 3-4.) Because the Commission cannot change its rules without providing other interested parties, including ARES, public utilities, and consumer representatives the opportunity for comment, the instant proceeding on reopening is procedurally flawed. (*See 5 ILCS 100/5-35; -5-40.*) Reopening of the instant proceeding fails to comply with the procedural safeguards associated with rulemakings.

Blackhawk respectfully request that based upon procedural due process concerns the Commission enter an Order in the instant proceeding that sets aside the Order Reopening.

##### **5. The Commission Should Have Filed A Complaint Rather Than Issuing The Ordering On Reopening**

The process used by the Commission to reopen the instant proceeding was not in accord with the requirements of procedural due process. If the Commission believed that WPS was

providing service in violation of Section 16-115(d)(5) of the Act, it could have initiated a complaint against WPS. (*See* 220 ILCS 5/16-115B.) The Commission did not follow the procedural route outlined in the Act and thereby violated the due process rights of WPS. (*See Quantum Pipeline Co., et al v. Illinois Commerce Comm*, 304 Ill. App. 3d 310, 709 N.E. 2d 950 (3rd Dist. 1999).)

In *Quantum*, the Commission entered an order rescinding Quantum's certificate of public convenience and necessity in a proceeding where the petitioners sought eminent domain power from the Commission. After concluding that petitioners had a property interest with respect to the certificate, the Court considered what procedure the petitioners were entitled to under the law. The Court's analysis and conclusions in *Quantum* are particularly instructive, since a court reviewing the instant proceeding likewise would conclude that WPS has a property interest in its certificate and then evaluate what due process WPS should have been afforded.

The Court in *Quantum* found that Section 200.900 of the Commission's Rules of Practice did not describe the process that should be followed when a certificate proceeding is reopened. (*See Quantum*, 709 N.E. 2d at 954.) The Court considered the power granted by Section 10-113 of the Act and concluded that it was necessary to look to Section 10-108, the statute addressing the procedure for complaints against utilities, for the statutory due process procedure required when rescission of a certificate is possible. (*See id.* at 956). As explained above, the Commission has improperly relied upon Section 10-113 of the Act to reopen a proceeding relating to an ARES. Nevertheless, even if Section 10-113 of the Act were held to apply, WPS has yet to afforded the procedural due process to which it is entitled.

Section 10-108 of the Act provides that the Commission can file a complaint setting forth anything allegedly done or admitted to be done in violation, or claim to be in violation, of any

provision of the Act, or of any order or rule of the Commission. (*See* 220 ILCS 5/10-108.) Accordingly, the Court in held, “section 10-113 in conjunction with section 10-108 makes clear that the Commission’s power to rescind, alter, or amend its own order can only be exercised after providing notice by means of a written complaint setting forth an alleged violation of the Act, order or rule.” (*Quantum*, 709 N.E. 2d at 956.) The Court further noted that “The Commission did not issue a written complaint charging any act or omission in violation of its prior order granting the petitioners’ certificate, or any change in the law, or any factual change constituting a violation.” (*Id.*) Since the Commission failed to file a complaint, the Court held due process was not afforded the certificated company.

The Court’s finding that the Commission should have initiated a complaint against the certificated company offers an additional reason to set aside the 2001 Order. The process utilized by the Commission in its Order Reopening the instant proceeding suffers from the same deficiencies. Although the Commission could have initiated a complaint pursuant to Section 16-115B of the Act, it did not. In short, just as in *Quantum*, there was no basis or authority for the Commission to reopen the instant proceeding.

#### **B. THE PROCEDURE EMPLOYED ON REOPENING VIOLATES THE ACT**

In the Act, there are clear procedural requirements that an applicant must comply with in order to become certificated by the Commission as an ARES. (*See* 220 ILCS 16-115.) The Act provides that an applicant is required to include with its application a **certification** that the Illinois electric utility cannot physically or economically serve in its utility affiliate’s service area. Significantly, the Act does **not** require that the applicant **prove**, by a preponderance of the evidence or otherwise, that the Illinois electric utility cannot physically or economically serve in its utility affiliate’s service area. Since WPS has complied with the Act, the Commission did not

err when it previously concluded that WPS should be granted certification as an ARES in Illinois.

There also are clear procedural requirements associated with challenging whether an ARES was properly certificated and whether the ARES is abiding by the requirements in the Act. (*See* 220 ILCS 5/16-115B.) As stated above, Section 16-115B of the Act specifically provides the Commission with the authority, after notice and hearing held on complaint or on the Commission's own motion, to take action against an ARES for any violation of or non-conformance with the provisions of Sections 16-115 or 16-115A of the Act. (*See id.*) Pursuant to Sections 16-115B of the Act, the Commission is expressly empowered to revoke or suspend the certificate of service authority of an ARES for substantial or repeated violations of or non-conformance with the provisions of Sections 16-115 or 16-115A of the Act. (*See* 220 ILCS 5/16-115B(b).)

Moreover, the Hearing Examiner utilized a procedure in the instant proceeding that violates the plain language in the Act with respect to ARES certification proceedings. As a result, the procedure has prejudiced WPS in its efforts to prepare a proper legal and substantive response to the Staff Report, Staff's Reply to Responses to the Staff Report, intervention and argument of other parties, and has denied WPS its procedural due process rights. Such a process should not, be tolerated by the Commission.

**1. The Admission of the Staff  
Report Into the Record Violates  
The Act And The ARES Certification Regulations**

The provisions of Section 16-115 of the Act govern the instant proceeding. (*See* 220 ILCS 5/16-115.) Section 16-115(d) of the Act requires the Commission to grant an application for a certificate of service authority if it makes findings based upon **the verified application and**



**such other information as the applicant may submit.** (See 220 ILCS 5/16-115(d).) (Emphasis added.) Contrary to the Commission's Order Reopening at pages 3-4, Section 16-115 of the Act does not allow the Commission to base its decision on information provided by the Commission Staff or any other person. None of the ARES certification rules provide for submission of arguments, reports, or comments by any party other than the applicant.

Furthermore, allowing the Staff Report to become a basis for a Commission decision regarding WPS's certificate, violates WPS's due process rights and constitutes reversible error.

## **2. Allowing Other Parties To Participate In The Instant Proceeding Is Not Contemplated By The Act Or The Commission's Rules**

The provisions of Section 16-115 of the Act, the Commission's Rules, and the ARES Certification Rules govern the issue of intervention and participation in the instant proceeding. (See 220 ILCS 5/16-115; 83 Ill. Admin. Code 200.200; 83 Ill. Admin. Code 451.) Nowhere is there any authority that would authorize parties other than the applicant to submit evidence, argument or pleadings in the instant proceeding. As a result of the Commission violating its authority in the instant proceeding, Blackhawk was forced to intervene to address these legal issue in the instant proceeding.

Section 16-115(d) of the Act requires the Commission to grant an application for a certificate of service authority if it "makes findings *based upon the verified application and such other information as the applicant may submit.*" (See 220 ILCS 5/16-115(d).) (Emphasis added.) Section 16-115 of the Act does not allow the Commission to allow intervention of any person into the application process, much less base its decision upon information provided by any other person. Thus, the Commission lacks statutory authority to allow the Staff, IBEW, CUB, the Illinois Energy Association, the Illinois Retail Merchants Association, the Joint

Intervenors or any other party to participate in the instant proceeding. By allowing these entities to become parties to the instant proceeding and to become active parties, WPS's due process rights were violated. (*See id.* *See also Balmoral Racing Club, Inc. v. Illinois Racing Bd.*, 151 Ill.2d 367, 404, 603 N.E.2d 489, 507 (1992), *citing Interstate Commerce Comm'n v. Louisville & Nashville R.R. Co.*, 227 U.S. 88 (1913).)

The confused process in the instant proceeding is further evidenced by the Hearing Examiner's declaration that the instant proceeding on reopening was to be conducted as a "contested case." (*See Tr.* at 30. *See also* 5 ILCS 100/1-30.) In contested cases before the Commission, parties are entitled to a hearing, an opportunity to present evidence and the ability to cross-examine adverse witnesses. (*See id.* *See also Abrahamson v. Illinois Dep't of Prof. Regulation*, 153 Ill.2d 76, 92, 606 N.E.2d 1111, 1120 (1992); *People ex rel. Ill. Commerce Comm'n v. Operator Communication, Inc.*, 281 Ill. App. 3d 297, 301-03, 666 N.E.2d 830, 832-34 (1st Dist.), *appeal denied* 168 Ill.2d 623, 671 N.E.2d 742 (1996); *Stillo v. State Retirement Sys.*, 305 Ill. App. 3d 1003, 1009, 714 N.E.2d 11, 16 (1st Dist. 1999).) WPS was not afforded these basic due process protections.

#### IV.

#### **THE RECIPROCITY PROVISION IN THE ACT WILL NOT WITHSTAND A CONSTITUTIONAL CHALLENGE**

The reciprocity provision in Section 16-115 of the Act is a burden that is placed upon any out-of-state utility affiliate that applies to become a certificated ARES in Illinois. If an out-of-state applicant or an entity affiliated with the applicant owns or controls facilities for the distribution and transmission of electricity in its own defined service territory, then that out-of-state applicant or its affiliate must provide reasonably comparable delivery service to the Illinois electric utility in whose service area the proposed service will be provided by the ARES. (*See*

220 ILCS 5/16-115.) Although the reciprocity provision may have been designed to encourage other states into an open market for electrical services, the Act discriminates against out-of-state entities on its face and in its effect. As a direct result of this discrimination, the reciprocity provision is an impermissible and unconstitutional burden on interstate commerce.

The “dormant” or “negative” Commerce Clause prohibits a state from enacting any legislation that burdens interstate commerce, unless the state has been empowered by Congress to enact such legislation. (*See* U.S. Const. art. I, § 8, cl. 3.) The United States Supreme Court has directed courts to use a “strict scrutiny” test to analyze the constitutionality of State laws that facially discriminates against out-of-state parties. (*See Sporhase v. Nebraska*, 458 U.S. 941, 958 (1982).) There is a presumption that such laws violate the Commerce Clause unless the state can prove that the discriminatory statute is necessary and is the least restrictive way to achieve an important governmental interest. (*See GM v. Tracy*, 519 U.S. 278 (1997).)

The reciprocity provision of the Act fails the strict scrutiny test because the provision is not necessary and does not achieve an important governmental purpose. Promoting deregulation of the retail electric markets in other states is not a legitimate basis for discriminatory treatment of out-of-state ARES applicants. (*See Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 379 (1976). *See also New Energy Corp. v. Limbach*, 486 U.S. 269, 279-80 (1988).)

## V.

### **CONCLUSION**

The Commission previously has concluded that as long as an ARES Applicant can demonstrate that it is either uneconomical or physically impossible for an Illinois electric utility to deliver electric power and energy to retail customers of an out-of-state utility affiliate, the ARES Applicant can meet the reciprocity requirements in the Act. (*See* Blackhawk Order at 21 -

23; Wisconsin Public Service Energy Services, Inc., *Application for a Certificate of Service Authority as an Alternative Retail Electric Supplier*, Docket 00-0199, Order at 9.) WPS has demonstrated that it complies with the reciprocity requirements of the Act because electric power and energy cannot be economically delivered from the service territories of Illinois utilities to serve retail load in the service areas of the utility affiliates of WPS.

WPS has satisfied fully the requirements contained in the Act and the Commission's Rules and regulations.

**WHEREFORE**, Blackhawk Energy Services, L.L.C. respectfully request that the Commission find that WPS's certificate is in compliance with the reciprocity requirements in Section 16-115(d)(5) of the Act.

Respectfully submitted,

**BLACKHAWK ENERGY SERVICES, L.L.C.**

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